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No. 87-1631

In The
# Supreme Court of the United States

October Term, 1987

BURLINGTON NORTHERN RAILROAD COMPANY,
*Petitioner,*

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION

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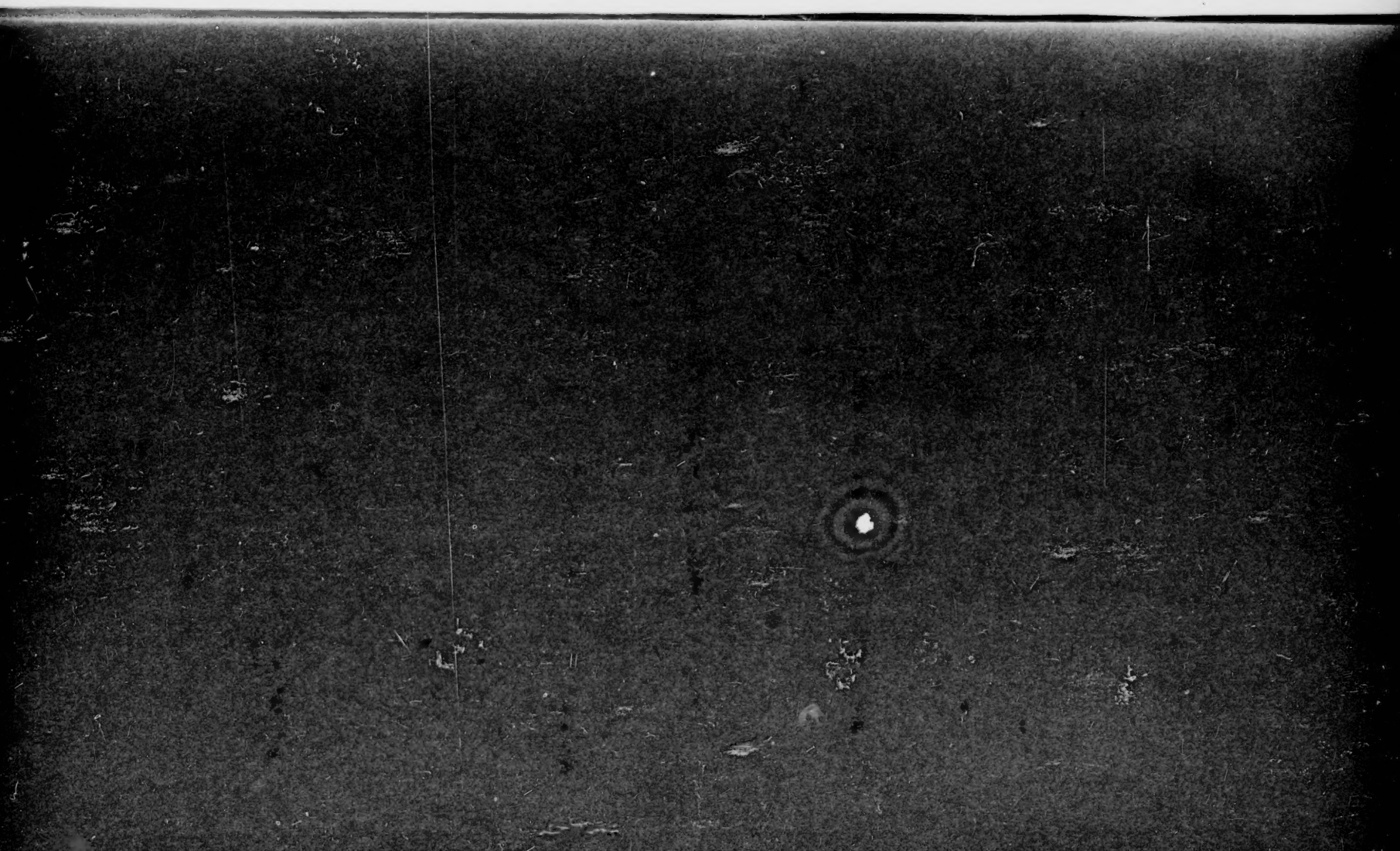

## QUESTION PRESENTED

Whether the court of appeals correctly held that a railroad violates the major dispute provisions of the Railway Labor Act by unilaterally instituting a program of mandatory body fluid drug and alcohol testing of railroad employees who may have been members of a crew involved in certain accidents, incidents or operating rule violations, when the bargaining agreement is silent on the subject, the carrier and craft representative are negotiating upon a program for alcohol and drug prevention accompanied by an employee assistance program, and the railroad has a long established practice of particularized suspicion, rather than body fluid testing, for detection and enforcement of the rule against drug and alcohol impairment.

## PARTIES BELOW

Respondent Brotherhood of Locomotive Engineers is the bargaining representative for the craft of locomotive engineers employed by the petitioner Burlington Northern Railroad Company.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES INVOLVED | i |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 12 |
| I. THE DECISION IS CONSISTENT WITH THE HOLDINGS OF THIS COURT | 16 |
| II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS | 21 |
| III. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT | 27 |
| CONCLUSION | 30 |
| APPENDIX | |
| Excerpts From Testimony of Dr. Robert J. Pandina on February 5 and 6, 1987 and September 21, 1987 in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority,* 678 F. Supp. 543 (E.D. Pa. 1988) | 1a |
| Opinion of Court of Appeals for the Ninth Circuit in *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.,* 838 F.2d 1102 (9th Cir. 1988) | 6a |

# TABLE OF AUTHORITIES

Page

## Cases

*Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 620 F. Supp. 163 (D. Mont. 1985), *aff'd*, 838 F.2d 1102 (9th Cir. 1988) ..... 6

*Brotherhood of Locomotive Engineers v. Southern Pacific Transportation Co.*, NRAB First Division Award No. 23334, 79 L.A.B. Arb. 618 (June 25, 1982) ..... 5

*Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986) ..... 14, 22, 24

*Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3677 (U.S. April 15, 1988) ..... 14, 22, 25

*Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) ..... 16, 17

*Detroit & Toledo S. L. R.R. v. United Transportation Union*, 396 U.S. 142 (1969) ..... 12, 17, 18, 19, 22

*Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1944) ..... 12, 16, 18

*International Association of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812 (9th Cir. 1985) ..... 16

*International Brotherhood of Teamsters, Chafeurs, Warehousemen & Helpers v. Southwest Airlines*, No. CA 3-86-3103-R (N.D. Tex. Jan. 9, 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) ..... 27

*Japan Air Lines Co. v. International Association of Machinists*, 538 F.2d 46 (2d Cir. 1976) ..... 20

*Missouri Pacific Joint Protective Board v. Missouri Pacific R.R.*, 730 F.2d 533 (8th Cir. 1984) ..... 23

TABLE OF AUTHORITIES—Continued

Pages

*National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Mar. 1, 1988) (No. 86-1879) ..... 29

*Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 300 (1960) ..... 19

*Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988) ..... 3, 5, 6, 12, 29

*Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. April 25, 1988) ..... 23

*St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982) ..... 23

*Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D. Pa. 1988), *appeal docketed*, No. 88-1160, etc. (3rd Cir. Mar. 9, 1988) ..... 2, 26

*Transport Workers Union, Local 553 v. Eastern Airlines, Inc.*, 544 F. Supp. 1315 (S.D. N.Y.), *aff'd as modified*, 695 F.2d 668 (2d Cir. 1982) ..... 23

*United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) ..... 23

*United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542 (3rd Cir. 1974) ..... 13, 27

STATUTES

National Labor Relations Act (29 U.S.C. §§ 151 *et seq.*)
Sec. 158(a)(5) (29 U.S.C. § 158(a)(5)) ..... 15
Sec. 158(d) (29 U.S.C. § 158(d)) ..... 28

Railway Labor Act (45 U.S.C. §§ 151 *et seq.*)
Sec. 1 (45 U.S.C. § 151) ..... 5, 12

TABLE OF AUTHORITIES—Continued

Pages

Sec. 2, Seventh (45 U.S.C. § 152, Seventh) ..... 13, 17

Sec. 3, First (i) (45 U.S.C. § 153, First (i)) ..... 16

Sec. 5 (45 U.S.C. § 155) ..... 16

Sec. 6 (45 U.S.C. § 156) ..... *passim*

OTHER

"CSX, Labor Ink Drug Test Pact," *Journal of Commerce*, August 7, 1987, p. 1A ..... 2

NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Lab. Law Rep. ¶ 9344 ..... 15, 28

Manello, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979) ..... 2, 29

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## BRIEF OF RESPONDENT IN OPPOSITION

## STATEMENT OF THE CASE

Since its founding in 1863, the preamble to the constitution of the respondent Brotherhood of Locomotive Engineers ("BLE") has stated that the organization's cardinal principles are "sobriety, truth, justice and morality." In accordance with its charter, BLE has been in the forefront in negotiating, and attempting to negotiate, agreements with rail carriers to reduce the incidents of alcohol abuse and drug use. Accordingly, BLE has attempted to and been successful in negotiating Operation

Red Block, peer referral and bypass agreements and employee assistance programs with many leading railroads, like Union Pacific and CSX Transportation. As a result of BLE's leadership in this area, CSX, BLE and the United Transportation Union, which also has a well developed negotiating program on the subject, entered into a drug testing program formulated in a medical mode, which they styled "a model for the railroad industry."[1] Notwithstanding the fact that the experts in this area unanimously agree that any effective program for reduction of drug and alcohol abuse must have collaboration, employee participation, education, rehabilitation, and fair, firm enforcement procedures as components,[2] a few railroads, like petitioner Burlington Northern Railroad Company ("BN"), refuse to negotiate upon or develop a comprehensive, cooperative, fair and effec-

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1 "CSX, Labor Ink Drug Test Pact," *Journal of Commerce*, August 7, 1987, p. 1A.

2 Manello, *Prevalence, Costs, and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979), concluded that labor should be a participant in planning these programs, serving on councils, and have specific responsibilities in the identification of employees who violate the rules. See also excerpts from testimony of Dr. Robert J. Pandina, expert witness for a regional transit authority, in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D. Pa. 1988), *appeal docketed*, No. 88-1160, etc. (3rd Cir. Mar. 9, 1988), on February 5 and 6, 1987 and September 21, 1987, which are contained in Respondent's Appendix hereto at pages 1a-6a (hereinafter "Resp. App."). For instance, Dr. Pandina testified "absolutely" in response to the question as to whether "one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management," and also agreed that negotiated programs are "most desirable." Resp. App. at 4a.

tive program. Rather, BN imposed its solution upon an employee relations problem, which policy includes mandatory drug testing that has ramifications upon the livelihood of all railroad employees, even employees who are innocent bystanders in the crew.[3]

Through the decades, locomotive engineers and other railroad employees have been required to comply with "Rule G," which forbids reporting to work under the influence of and on-the-job use or possession of alcohol and drugs.[4] The method by which Rule G violations are to be

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[3] BN concedes that compulsory urinalysis takes place under its program for minor human-factor incidents, such as "derailments in yard or industry switching, failures to respond to signals, running through switches or derailments, and failure to secure." Pet. at 7 n. 12. As the dissenting opinion below noted, unless "responsibility is clearly identified" in even these minor incidents, the entire crew is subjected to compulsory urine testing and "[a]n employee who refuses to submit to a blood or urine test is subject to discipline for insubordination." Appendix to Petition at 16a, 17a (hereinafter "Pet. App."); see also C. J. Bryan Memo., Pet. App. 99a. Moreover, "[t]he literature on drug testing is replete with references to the unreliability of results. See *Testing for Drug Use in the American Workplace: A Symposium*, 11 *Nova L. Rev.* (1987) *passim*. Requiring individualized suspicion would help to alleviate the harsh consequences of exclusive reliance on test results." *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575, at 589 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988). In short, a person only indirectly involved in a minor human-factor incident may end up fighting to retain his employment by reason of a false positive urine test required by BN's unilaterally imposed compulsory test.

[4] On BN, Rule G reads as follows:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana or

(Continued on following page)

detected is not set forth in any collective bargaining agreement between the parties.[5] Rather, through decades of past practice, a mutually accepted method of detection and enforcement evolved, in which employees exhibiting outward manifestations of a drugged or intoxicated state, such as lack of coordination, slurred speech, alcoholic breath, red eyes or dilated pupils, or other visual evidences of unusual behavior associated with drug or alcohol use, were charged with Rule G violations. Tr. I at 27, 154; Tr. II at 17-18.

BLE has increased its efforts in recent years to foster a drug and alcohol free working environment through collectively bargained prevention programs which are based on equitable, humane principles, but are designed to efficiently and effectively treat with the problem. Tr. I at 29.

BLE's efforts to establish a cooperative program on BN began in October 1983. *Id.*, 31. BN repelled these early efforts, but the BLE subsequently submitted formal negotiating proposals in a letter dated April 23, 1984. *Id.* At a meeting held on May 10, 1984 to discuss BLE's proposals, BN demanded that random testing be part of any

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(Continued from previous page)

other controlled substances or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

Pet. App. at 74a-75a.

5 Transcript of district court hearing held November 13, 1984 at 26-27 (hereinafter "Tr. I"). The references to the transcript of the district court hearing of March 21, 1985 will be referred to as "Tr. II".

agreement reached by the parties. That mandate eventually led to a breakup of the negotiations. *Id.* at 33-34, 137.

Shortly thereafter, BN unilaterally promulgated a sniffer dog search and surveillance program in which employees were subjected to random sniffer dog searches. *Id.* at 28. The parties met on several occasions to discuss BLE's objections to the use of sniffer dogs and BLE's proposed prevention programs.[6] *Id.* at 45-46, 55-57, 60. By demand of its membership, BLE circulated a strike ballot which resulted in an overwhelming vote in favor of a peaceful withdrawal from service. *Id.*, 57-59. Though BLE returned to the bargaining table, BN remained steadfast in insisting on the use of sniffer dogs. *Id.*, 60-62, 156-57.

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[6] On April 5, 1984, after BLE had submitted its proposals to BN, the Federal Railroad Administration ("FRA") issued a notice of proposed rulemaking for the control of alcohol and drug use in railroad operations. 49 Fed. Reg. 24,252. The FRA rules, as finally adopted on August 2, 1985, 50 Fed. Reg. 31508, required toxilogical testing of employees following major accidents and authorized railroads within various limitations to require employees to submit to breath and urine tests as a matter of course following specified operating rule violations and incidental human errors. The railroads sought this authority from the FRA, because they contended that under existing practices in the industry, as affirmed by the First Division of the National Railroad Adjustment Board in *Brotherhood of Locomotive Engineers v. Southern Pacific Transportation Co.*, Award No. 23334, 79 L.A.B. Arb. 618 (June 25, 1982), and by reason of the major dispute provisions contained in the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, they lacked authority to unilaterally institute a program requiring employees to submit to testing for operating rule violations and human factor incidents. 49 Fed. Reg. 24,253. The FRA rules were invalidated for Fourth Amendment reasons in *Railway Labor Executives' Ass'n v. Burnley, supra*, 839 F.2d 575.

On August 31, 1984, BLE challenged BN's unilaterally promulgated sniffer dog search policy in the United States District Court for the District of Montana. On October 5, 1984, the district court issued a preliminary injunction against BN's use of sniffer dogs.[7] But this did not stop BN's unilaterally developed and administered drug and alcohol testing program.

On November 5, 1984, BN, through its senior vice-president of operations, Charles J. Bryan, issued a policy directive to management officials requiring blood and urine tests in certain circumstances. Pet. App. 16a. Taking a cue from the FRA's proposed rules, this policy not only required compulsory testing after accidents but also after, among other things, minor incidents and operating rule violations. Pet. App. 99a. Under this policy, an employee, who is a crew member in which an operating violation or human-factor incident occurs, is subject to a urinalysis test as a condition of employment even though there is no reason to suspect the employee is under the influence of any prohibited substance. *Id.*

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[7] On July 31, 1985, the district court found that the sniffer dog search and surveillance program was not "arguably justified" by the agreement and past practices between the parties. The court held the dispute to be a "major" one, which required BN to exhaust the notice and bargaining provisions of the Railway Labor Act, and granted a permanent injunction. *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 620 F. Supp. 163 (D. Mont. 1985), *aff'd*, 838 F.2d 1102 (9th Cir. 1988). This decision was unanimously affirmed by the same panel of the court of appeals on the same day as the opinions were issued in this case, 838 F.2d 1087, and in *Railway Labor Executives' Ass'n v. Burnley, supra*. The opinion of the Ninth Circuit in the sniffer dog case is reproduced in Resp. App. at 6a-35a. The concurring opinion of the appeals court amplifies upon the thought process set forth in the majority opinion in the case at bar.

Contrary to the implication advanced by petitioner (Petition 7, 8), the policy was not an adjunct or extension of a program already applied to locomotive engineers represented by BLE. Instead, the evidence presented at trial showed it to be a new program. Among other things, the evidence showed that BN officials admitted in various forums that "[i]t is a new policy" and that "[i]t went into effect approximately the last week of November [1984]." Pl. Trial Exs. 17 at 13, 19 at 11. Moreover, a BN vice-president in the Twin Cities Region wrote in "On Track," a BN employee newsletter:

> This Region has had a urinalysis policy in effect since November of 1984.
>
> Since the program started ten employees from our Region have been asked to provide samples. None of these tested positive, and accordingly, no action was taken.

Pl. Trial Ex. 20.

Prior to November 1984, the evidence showed, toxicological tests were not used for purposes of detection or enforcement purposes, but were offered the employee desiring to take a test for purposes of refutation in any subsequent Rule G violation investigation. *E.g.*, Tr. II at 21-22; Pl. Trial Ex. 28 at 4, Pl. Trial Ex. 29 at 8-9. An employee declining this opportunity to submit to body fluid tests was never disciplined for refusing to take the test. Pl. Trial Ex. 22. Under the unilaterally established program, he would be disciplined or discharged for insubordination. Tr. II at 44-45; Pl. Trial Ex. 22.

In December 1984, BLE notified BN of its objections to the body fluid testing inaugurated in the last week of November. Pet. App. at 17a. BLE then moved to amend

its complaint to include this mandatory blood or urine testing, which motion the district court denied. *Id.* On January 7, 1985, BN filed a notice of intent to submit to arbitration the issue of whether mandatory testing was permitted under the bargaining agreement between BLE and BN. BN subsequently filed a submission with the National Railroad Adjustment Board.[8]

On February 14, 1985, BLE filed a complaint seeking declaratory and injunctive relief against the compulsory drug and alcohol testing program inaugurated in November 1984. BLE moved for a preliminary injunction on March 7, 1985. BN then filed a motion to dismiss and alleged that the Adjustment Board had exclusive subject matter jurisdiction over the matter because it was a "minor dispute" under the Railway Labor Act. An evidentiary hearing was held on March 21, 1985, and the district court treated BN's motion as one for summary judgment. Pet. App. 34a, n.1.

On July 31, 1985, the trial court granted BN's motion for summary judgment. In the course of his opinion, the trial judge stated:

> The BN's random use of urinalysis to detect violations would present a "major" dispute subject to the status quo provisions of 45 U.S.C. § 156. The subjection of an employee to a urinalyses (sic) on a

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[8] The case was docketed as NRAB Case No. B-1812. Although BLE objected to the jurisdiction of the First Division of the Adjustment Board, it filed an answering submission on September 5, 1985. The case was argued on February 25, 1987, but no decision has been entered or is presently anticipated by the arbitrator.

> random basis is not "arguably" justified by the terms of the implied agreement extant between the parties.

Pet. App. 35a.

Canvassing the factual record, the district court said:

> The question of whether the urinalyses practice is "arguably justified" by the implied agreement, regarding Rule G, found to exist between the Brotherhood and the BN in *BLE I* is not as clear cut as the question was with respect to the random use of drug detection dogs.

*Id.*

Based upon his view of the facts, the trial judge found that the established practices between the parties reaching "an implied contractual status" only required "the existence of a modicum of evidence that a particular employee was operating under the influence of a prohibited substance, before a supervisor could conduct further investigation." *Id.* Notwithstanding that prior to November 1984 the enforcement of Rule G was triggered as to locomotive engineers only by outward manifestations of drug or alcohol use, *i.e.*, probable cause, not minor incidents or inconsequential rule violations[9], or even accidents, and notwithstanding undisputed testimony that the triggering of Rule G did not lead to mandatory body fluid testing with any positive test results—even those results not establishing impairment—being used as the basis for auto-

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[9] At the March 21, 1985 hearing, BLE presented evidence of over 700 incidents that occur with relative frequency, such as derailments, side swipes, and switch run throughs, and that prior to BN's new mandatory blood and urine testing policy had not been considered cause to justify an alleged claim of Rule G violation or to require body fluid testing. Pl. Trial Ex. 21; Tr. II at 22.

matic discharge, the court concluded "the urinalyses practice challenged by the Brotherhood is 'arguably justified' under the terms of the agreement extant between the Brotherhood and the BN." *Id.* Based upon its view of the facts, the district court held that it lacked subject matter jurisdiction because the dispute was minor. *Id.*

In a decision filed on February 11, 1988, the Court of Appeals for the Ninth Circuit reversed in a divided opinion. At the outset, the majority opinion set forth the traditional standards for determining whether a dispute is major or minor under the Railway Labor Act and summarized the customary considerations in determining if a practice reaches the status of an implied provision of the collective agreement. As the parties conceded and the trial court agreed: "It is clear that BN's new mandatory urine testing program does not fall within the scope of any express provision of the collective bargaining agreement."

Pet. App. 9a.

The majority then turned to the issue of whether mandatory urine testing was arguably justified by "either a term implied by past practice (an 'implied-in-fact' term) or a term implied by statute or regulation (an 'implied-in-law' term)." *Id.* As the foundation for its conclusion, the majority noted that "both Rule G and its customary enforcement by sensory surveillance were implied-in-fact terms of the collective agreement between BN and BLE" and that "BN has never disputed that sensory surveillance by BN's supervisors was the primary means of detecting Rule G violations before 1984." *Id.* The court below rejected BN's contention and the trial court's conclusion that

the urine testing program is justified by the past practice of sensory surveillance because

> this conclusion ignores the critical differences between the old method and the new method. The old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion.[10]

Pet. App. 10a.

Analyzing the record evidence, the court said:

> We do not agree that BLE, by acquiescing in Rule G's enforcement by sensory surveillance, can be said to have agreed to allow BN to implement any procedure beyond sensory surveillance so long as the procedure is brought into play by a "modicum of evidence" or an "objective triggering event." The kind of sensory surveillance that BN's supervisors had employed in the past—observing an employee's gait, breath, odor, slurred speech, or blood shot eyes—was non-intrusive. It did not implicate the serious privacy intrusions posed by BN's use of mandatory urine testing. Moreover, the sensory surveillance employed by BN's supervisors in the past required suspicion of individual workers based on their conduct and appearance, whereas the new mandatory urine testing procedure may be imposed on the basis of generalized suspicion encompassing an entire train crew.

*Id.*

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[10] The dissenting opinion conceded that the majority had correctly stated the applicable legal standards and that the mandatory testing program was new and "an innovation," but "agree[d] with the district court that it is arguable that because the present procedure does not come into play unless there is an objective triggering event which justifies the investigation of a suspected Rule G violation, the urine or blood testing falls within the implied contractual condition of the collective bargaining agreement." Pet. App. 29a.

As a separate, but also supplemental basis for its reading of the facts, the majority referring to the opinion in *Railway Labor Executives' Ass'n v. Burnley, supra,* "decline[d] to assume that BLE members implicitly granted BN the authority to invade their privacy in ways the government could not." Pet. App. 11a.

In holding the dispute was major, the Court said:

> BN's new mandatory urine testing program is a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute. It is a mistake to conclude that BLE impliedly agreed to the new testing program just because "through custom and practice" it had for forty years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance.

Pet. App. 11a-12a.

The court of appeals also noted that "generalized mandatory urine testing is not an implied-in-law condition of the collective agreement, and BLE's resistance to that program constitutes not a minor, but a major dispute." Pet. App. 12a.

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## REASONS FOR DENYING THE WRIT

This case simply involves the application of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* It involves no question of law that is novel or worthy of review. This Court has defined in detail the standards for determining "major" and "minor" disputes. *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711 (1944). In *Detroit & Toledo S.L. R.R. v. United Transportation Union,* 396

U.S. 142 (1969), the Court held that unilateral changes by a carrier in major working conditions without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the Railway Labor Act was a major dispute and violated Sections 2, Seventh and 6, 45 U.S.C. §§ 152, Seventh, and 156. Therefore, that carrier's actions warranted dismissal of the railroad's complaint for a strike injunction and a grant of relief enjoining its unilateral actions. The status quo to be preserved until the Act's procedures are invoked and exhausted, the Court said, "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." *Id.*, at 143.

Moreover, the courts of appeals have developed a well-established, uniform test for deciding whether a set of facts constitutes a major or minor dispute. *See, e.g., United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, at 544 n.5 (3rd Cir. 1974). In sum, this test requires an overview as to whether existing collective bargaining provisions "arguably justify" the carrier's unilateral action or are "reasonably susceptible" of the interpretation being applied by the carrier. Even as the dissenting opinion admits (Pet. App. 13a), the majority correctly set forth the legal standards for determination of the nature of the dispute.

Accordingly, this case involves only the question of whether the court of appeals correctly canvassed the record in a suit brought by a union to prevent a railroad from unilaterally creating and subsequently administering a compulsory drug and alcohol testing program, when the parties were negotiating upon a collaborative program of use prevention combined with an employee assistance pro-

gram and the railroad had a long established practice of particularized suspicion, rather than mandatory blood and urine testing, for enforcement of the rule against drug and alcohol impairment. The court of appeals held that the facts of the case established that the dispute between the parties was a major one involving an attempt by the railroad to insert a new provision in the collective bargaining agreement by creating a new method for enforcing Rule G which is mandatory and requires only generalized suspicion. Pet. App. 10a. Finding a dearth of evidence supporting the district court's view that the dispute was minor, the court had no doubt that the dispute was major—"a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute." Pet. App. 11a. Whether the court of appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

The Ninth Circuit had before it a different record than the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). Furthermore, the established practice between BN and that union was far different from BN's past activity with BLE. While the employees represented by that organization apparently may have been subjected to compulsory body fluid testing, which had not been objected to over the years, locomotive engineers were not. On a different set of facts, the Eighth Circuit later held that unilateral changes by a different carrier in Rule G and its enforcement created a major dispute. *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330 (8th

Cir. 1987), *cert. denied*, 56 U.S.L.W. 3677 (U.S. April 15, 1988).

Even if one were to perceive this as a drug and alcohol case, the experts on the subject of reducing or eliminating use of such substances agree that negotiated programs are the most effective, efficient and humane way to deal with the problem. See p. 2, fn. 2, *supra*. And the General Counsel for the National Labor Relations Board agrees that testing is a mandatory subject of collective bargaining and unilaterally established programs violate the duty to bargain in good faith set forth in Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5). NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Lab. Law Rep. ¶ 9344.[11]

Therefore, contrary to the petitioner's contentions, the decision below is not in conflict with any decision of the other courts of appeals and presents no question under the Railway Labor Act which merits this Court's review. Moreover, the decision is consistent with the hold-

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[11] As the NLRB General Counsel stated, the addition of drug testing "constitutes a substantial change in the employees' terms and conditions of employment," for

> a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. (Footnote omitted.)

4 CCH Lab. Law. Rep. ¶ 9344 at 19,202.

ings of this Court and its reading of the Railway Labor Act.

## I.

## THE DECISION IS CONSISTENT WITH THE HOLDINGS OF THIS COURT

This Court established the major-minor dichotomy in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 723 (1944) ("Burley"). As petitioner states, the specific procedures for resolving labor disputes under the Railway Labor Act depend upon what category the dispute is classified. (Pet. at 3). "Minor" disputes arise out of the application or interpretation of collective bargaining agreements. *Id.;* see also 45 U.S.C. § 153, First (i). "Major" disputes, on the other hand, relate to proposed changes in collective bargaining agreements. *Id.* They "concern [either] the formation of collective bargaining agreements or efforts to secure new rights and incorporate them into future agreements." *International Association of Machinists v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985) (citing *Burley, supra*, 325 U.S. at 723).

While minor disputes are resolved through arbitration before the National Railroad Adjustment Board, major disputes are subject to the procedures for notice, negotiation and mediation set forth in Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. §§ 155 and 156. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969); *Burley, supra*, 325 U.S. at 722-25. During the period that the major disputes procedures are being exercised, or should be used, Section 6 of the

Railway Labor Act, specifies that the "rates of pay, rules, or working conditions shall not be altered by the carrier."

The Court has held that the Act's status quo requirement is central to its design. *Detroit & Toledo S.L. R.R. v. United Transportation Union*, 396 U.S. 142, 150 (1969) ("Shore Line"). The purpose of this requirement is to prevent the employees from striking and a carrier from doing anything that would justify a strike. In fact, the "heart of the Railway Labor Act" is the duty to make every effort to reach consensual solutions to disputes in the workplace. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 378.

In *Shore Line*, the railroad claimed that it had the unilateral right under the collective bargaining agreement to establish outlying assignments, because, as BN also asserts, the contract was silent on that subject. The carrier issued a bulletin creating disputed work assignments. The new assignments would have required the employees to report for work at a different point from where they had been reporting for many years. This reporting point was not mentioned in the agreement, but became an established practice through long, customary usage, a practice that could not be changed at the whim of management. *Id.* at 143.

This Court held that the railroad's unilateral changes in reporting points and work assignments without first serving a Section 6 notice and thereafter exhausting the negotiation procedures of the Act violated Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh and 156, and warranted dismissal of the carrier's complaint for a strike injunction and the grant of relief enjoining its unilateral action. In reaching this conclusion,

the Court rejected the railroad's contention that the status quo which the Railway Labor Act requires be maintained consists only of the working conditions specifically covered in the current agreement between the carrier and union. Instead, what must be preserved as the status quo until the Act's procedures are invoked and exhausted "are the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing agreement." *Id.*, 143.

The decision below conforms with the standards elaborated upon by the Court in *Burley* and *Shore Line*. Historically, violations of Rule G have been detected and enforced through sensory surveillance. Pet. App. 3a. BN did not subject employees to mandatory testing, even where there was particularized suspicion that the individual was under the influence of alcohol or drugs. The bargaining agreement was silent on Rule G and did not expressly or implicitly refer to that rule or to its enforcement. BLE opened negotiations with BN upon a cooperative, complete drug and alcohol use and prevention program, and submitted written proposals to BN. While the parties were negotiating, BN unilaterally placed into effect its sniffer dog search and surveillance program. When that program was enjoined, BN unilaterally promulgated the compulsory body fluid testing for accidents and human-factor incidents. These actions of BN sought rights for the future, which it had never previously exercised or had been granted—the typical major dispute. *Burley, supra*, 325 U.S. at 723. Just as the railroad in *Shore Line* argued that the agreement's silence and the justifiable nature of its conduct, in its view at least, gave it the right to act unilaterally, both the district court and BN sought to justify the position that BN could unilater-

ally require submission to chemical testing, because there was no express prohibition in the agreement between BLE and BN and the slightest of incidents was an adequate substitute for the historical sensory surveillance to permit BN to test where it had not before. The court of appeals, however, correctly found this approach was much the same as that taken by the railroad in *Shore Line* and, moreover, misread the facts by "ignor[ing] the critical differences between the old method and the new method." As the Ninth Circuit continued: "The old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion." Pet. App. 10a. In accordance with *Shore Line*, the court of appeals correctly rejected the attempt by BN to change existing legal obligations to the basic employment relationship—changes by which the "jobs of present employees are jeopardized"—without complying with the major disputes procedures set forth in the Railway Labor Act. *Id.* at 6a, 10a.

The decision of the Ninth Circuit is also consistent with this Court's ruling in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 300 (1960), a case involving the question whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, deprived the federal courts of jurisdiction to enjoin a railway union's strike to force the carrier to bargain upon a Section 6 notice requesting a contract provision barring the abolition of jobs without the union's consent. Similar to BN's contention that drug testing is a managerial prerogative, the rail carrier refused to negotiate on the ground the issue was nonbargainable in that a state regulatory agency had permitted it to abandon the work locations where the jobs were to be removed. Finding the dispute related to a

major change in the existing contract, rather than to a mere infraction or interpretation of that contract, the Court reversed the order granting the strike injunction. The Court rejected the contention that an attempt to insert a new provision going to the heart of employment, job security, was not negotiable, and in reply to the traditional carrier argument that the controversy is a minor one, this Court stated:

> . . . [I]t is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of that agreement.

*Id.* at 341.

Similarly, in the instant case, the court of appeals, adopting the test formulated by the Second Circuit in *Japan Air Lines Co. v. International Association of Machinists*, 538 F.2d 46, 52 (2d Cir. 1976), held that "[t]he Railway Labor Act requires parties to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits." Pet. App. 6a. Based upon this test, the lower court found: "Because jobs of present employees are jeopardized, BN's mandatory urine testing program is a mandatory subject of bargaining under the Railway Labor Act and may not be implemented unilaterally." *Id.* The court below found, therefore, that BN's management prerogative claim did not properly lie. *Id.* Consistent with the decisions of this Court, the court of appeals appropriately found the dispute between the parties to be a major one and reversed the judgment of the district court.

## II.

## THERE IS NO CONFLICT BETWEEN THE CIRCUITS

Petitioner appears to contend that the decision below should be judged by different standards as to managerial prerogative and major-minor dispute because the subject matter of the dispute is drug testing. Caught up with the current hysteria as to alcohol abuse and drug use, BN seeks a ruling that conditions dictate the immediate institution of compulsory drug testing programs and that carriers should, therefore, be permitted to bypass the Railway Labor Act bargaining procedures. According to this theory, an arbitrator could later place the imprimatur of a pseudo-judicial ruling upon the carrier's action, and the employees and their collective voice would be pacified. Logic would indicate that at a later juncture this special nitch carved from the Railway Labor Act for this type of dispute would be urged to extend to other major disputes. In short, BN is complaining about the process—a process which has been shown to work in the case of CSX Transportation and other rail carriers. If BN has any complaint about the Railway Labor Act, or that bargaining process, it should be directed to the Congress, which currently has before it legislation (H.R. 3051) that could remove this item from the bargaining table.[12]

BN, as well as the dissenting opinion, agree that the majority accurately summarized the standard for distinguishing between major and minor disputes. Pet. 11; Pet. App. 13a. Thus, it becomes obvious that petitioner's contention rests upon its view that drug testing programs

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12 Whether such legislation could withstand challenges under the Fourth Amendment would be another issue.

are nonbargainable or are minor disputes per se, or upon its failure to perceive that the application of the major-minor principles, especially in situations where there is no express contractual provision, is dependent upon the record made in each peculiar situation, and the determination whether that action unilaterally repudiated the collective bargaining agreement,[13] thereby triggering a major dispute under the Railway Labor Act. From this staging point, BN contends that the decision below conflicts with the decisions of other courts in two respects: The court of appeals improperly applied the test by which the major-minor decision turns, and the result is contrary to the decision of the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). It is incorrect on both contentions.

First, since the *Shore Line* case, numerous courts, upon their assessment of the record before them, have found a major dispute to exist where a carrier makes a unilateral change in the "actual, objective working conditions", even though the written agreement was silent on the subject involved in the dispute between the parties. For example, in *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co.*, 827 F.2d 330, 333 (8th Cir. 1987), *cert denied*, 56 *U.S.L.W.* 3677 (U.S. April 15, 1988), a new rule disciplining employees for off duty use or possession of narcotics constituted a formal change of the collective bargaining agreement and, therefore, was a major dispute under the Railway

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[13] In fact, in *Shore Line*, the Court held that the collective bargaining agreement only establishes the minimum terms, for the "status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement." 396 U.S. at 153.

Labor Act. In *St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981), *cert. denied*, 456 U.S. 945 (1982), contracting out services to non-union employees violated the collective bargaining agreement and constituted a major dispute under the Railway Labor Act. In *Transport Workers Union, Local 553 v. Eastern Airlines, Inc.*, 544 F. Supp. 1315 (S.D. N.Y.), *aff'd as modified*, 695 F.2d 668 (2d Cir. 1982), the use of Braniff flight attendants on Eastern's foreign flights violated Eastern's collective bargaining agreement triggering a major dispute. In a pre-*Shore Line* case, the Fifth Circuit held the leasing out of assets to a non-union entity violated the agreement and constituted a major dispute under the Railway Labor Act. *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F.2d 183, 190 (5th Cir. 1965). In *Railway Labor Executives' Ass'n v. Consolidated Rail Corp.*, No. 87-1289 (3d Cir. April 25, 1988), the Third Circuit held that the unilateral addition of a drug-screening component as part of periodic and return-to-duty medical examinations was a major dispute, "because the undisputed terms of the implied agreement governing medical examinations cannot be plausibly interpreted to justify the new testing program" and the carrier's arguable contractual basis "overlooks what to us is the determinative distinction between the old and new practice: before, drug screening was included only when there was particularized cause and not as part of the routine urinalysis."

In sum, as the Eighth Circuit appropriately said in *Missouri Pacific Joint Protective Board v. Missouri Pacific R.R.*, 730 F.2d 533, at 536-37 (8th Cir. 1984):

> . . . [W]hether a dispute is minor or major is often a question of degree, *Itasca Lodge 2029 v. Ry. Express Agency, Inc.*, 391 F.2d 657, 665 (8th Cir. 1968) (quoting *Rutland R.R. Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962),

*cert. denied*, 372 U.S. 954 (1963), and turns upon the facts in each case. *See United Transportation Union, Lodge 612 v. Illinois Terminal R.R. Co.*, 471 F.2d 375, 379 (7th Cir. 1972); *Rutland*, 307 F.2d at 36. Whether a dispute is minor or major involves first a determination of factual issues, *see Airline Pilots Ass'n v. Northwest Airlines, Inc.*, 570 F.2d 257, 258 (8th Cir. 1978), and then conclusions of law based on those findings.

Second, petitioner claims that the lower court's decision conflicts with the ruling of the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). In reaching this conclusion, not only does petitioner misconstrue the opinion below, but it misreads the standard against which the conclusion of major dispute is to be measured. Petitioner conveniently overlooks the important interrelationship between the factual issues of BN's past practices and operational changes with the legal conclusions regarding the scope of the agreements between the parties. All that the decision of the Eighth Circuit in *Brotherhood of Maintenance of Way Employes v. Burlington Northern R.R.*, *supra*, establishes is that in canvassing that record as to the past practices between that union and the BN, that court found the changes were minor and the railroad had stayed "within the boundaries of this understanding" and had not "depart[ed] from these established practices in such a substantial way as to abrogate the implied contractual term which they represent." *Id.* at 1022. Based upon the interrelationship of these factual findings and the legal conclusions regarding the scope of the agreements between BN and the maintenance of way employees union, the Eighth Circuit held that post-incident and post-furlough testing were minor. As the decision is based upon that court's canvassing of the record before it, a record far different from that before

the Ninth Circuit, the result cannot be considered in conflict. If it is considered to be inconsistent, it is wrong as the reasoning in the following decisions establish.

That the decision of the Eighth Circuit must be read in this light can be easily gleaned from its most recent decision in *Brotherhood of Maintenance of Way Employes v. Chicago and North Western Transportation Co., supra,* 827 F.2d 330. In that case, the Eighth Circuit refused to accept an argument similar to that being made by petitioner. After quoting extensively from its prior opinion relied upon by BN in the petition, the court found, upon its review of the record, "that the district court did not err in holding that Rule G, by virtue of the parties' long-standing and recognized custom and practice, has become an implied term in the agreement of the parties." *Id.*, 334. Turning to "whether the pre-amendment version of the parties' agreement (the implied term under the 'old Rule G') is 'reasonably susceptible' to being interpreted in a manner consistent with the post-amendment version (the implied term under the 'new Rule G')" (*id.*), the court concluded (*id.*, 336):

> Common sense and this Court's prior cases indicate that there are limits on the extent to which the CNW may amend Rule G consistent with the history and acquiescence of the parties in past amendments. In this light we agree with the district court that the agreement of the parties (including any terms necessarily implied as a result of established past practices and working conditions) is not reasonably susceptible to the CNW's proposed interpretation whereby it has the right to unilaterally extend its operating rules to regulate off duty use, possession, or sale of illegal drugs in the manner contemplated by Rule G.[5]

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[5] The CNW additionally contends that because it has retained the right to unilaterally amend Rule G since its inception, the status quo imposed pursuant to 45 U.S.C. § 156 must also include that right. * * * On the

(Continued on following page)

Based upon its intertwining of the factual issues into its legal conclusions as to the scope of the agreements between the parties, the Eighth Circuit determined that dispute was major.

Two district courts also have enjoined as major disputes drug testing programs unilaterally established by carriers subject to the Railway Labor Act. In *Transportation Workers Union, Local 234 et al. v. Southeastern Pennsylvania Transportation Authority*, 678 F. Supp. 543 (E.D. Pa. 1988), *appeal docketed*, No. 88-1160, etc. (3rd Cir. Mar. 9, 1988), the district court granted the railway unions a status quo injunction pending exhaustion of the requirements of 45 U.S.C. § 156 for the following reasons that are equally applicable to this case:

> The union's acquiescence in suspicion-based, post-violation, transfer and promotion testing cannot be interpreted as an authorization or even foreshadowing of 87-1. *Brotherhood of Maintenance of Way Employes, Lodge 16*, 802 F.2d at 1023. Only "long standing practices" can be considered part of a collective bargaining agreement in determining whether a proposed change is "arguably justified" by the parties' agreement. *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968).
>
> SEPTA proposes to test 45 percent of its operating employees at least once each year. The incidence, focus, rationale for, and employee impact of such testing is substantially different from 85-1, and it obviously will affect the working relationship of the parties. The proposal cannot be "arguably justified" by the terms of prior agreements or the parties' prior practice. The unions are correct that the proposed program constitutes a "major dispute."

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(Continued from previous page)

basis of our rejection of the CNW's assertion that any implied term must include the absolute power to amend Rule G unilaterally, we affirm the district court in this regard.

Without benefit of the reasoning of the Ninth Circuit, that court agreed that Rule G and past practices of enforcement do not arguably justify *any* reasonable detection program and enforcement method. Pet. App.10a. Similarly, in *International Brotherhood of Teamsters, Chafeurs, Warehousemen & Helpers v. Southwest Airlines*, No. CA 3-86-3103-R (N.D. Tex. Jan. 9, 1987), *appeal docketed*, No. 87-1085 (5th Cir. Jan. 30, 1987) (Pet. App. 121a), that district court found that, where as here, there was no past practice of mandatory body fluids testing to enforce the rules prohibiting the possession, sale and use of alcohol and drugs, the creation of "a comprehensive program for monitoring, testing and punishing employees and following up on detected drug-alcohol use" did "constitute a major dispute in its implementation and that the union would be entitled to the injunction it seeks under the Railway Labor Act." Pet. App. 128a.

In any manner viewed, the decision of the court of appeals is consistent in reasoning with prior Railway Labor Act decisions and does not conflict with any applicable holding in any other circuit.

## III.

## THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION THAT NEEDS TO BE ADDRESSED BY THE COURT

As we have shown, this case involves only a Railway Labor Act issue—one which has been authoritatively determined by this Court, was decided under a uniform standard followed by the various courts of appeal (*see United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, at 544 n.5 (3rd Cir. 1974)), and has been ruled upon in a consistent manner by various courts. Moreover, petitioner is requesting this Court to address an issue that is more properly one to be determined, if at all, by legisla-

tion—legislation, regardless of its merit, that could remove drug and alcohol testing programs from the collective bargaining table and give employers exclusive authority to promulgate massive testing programs.

In a disingenuous argument that relies upon hyperbole, *e.g.*, issue of "major national importance," "public interest in safety," "need for prompt and effective responses," need "to tailor solutions to specific problems," "incentive to increase the effectiveness of their programs," ability to use "new and superior technologies," BN attempts to turn a relatively simple labor issue into a unique and unusual situation. As previously established, that claim is based upon an erroneous view of what the court of appeals decided in this case; it did not decide that employees can use alcohol and drugs with impunity. That claim is contrary to the prevailing view that drug testing affects employment relationships and is a working condition. That claim is contrary to the well held principle that drug testing is an appropriate subject of collective bargaining.[14] That position contravenes well held expert opin-

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[14] In NLRB General Counsel Memorandum 87-5 (Sept. 8, 1987), 4 CCH Labor Law Rep. ¶ 9344, the General Counsel for the National Labor Relations Board opined that: (1) drug testing for employees and job applicants is a mandatory subject of bargaining under Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 158(d); (2) implementation of a drug testing program is a substantial change in working conditions even where physical examinations previously had been given and even if established work rules precluded the use or possession of drugs in the plant; and (3) the established Board policy that a union's waiver of its bargaining rights must be clear and unmistakable will be applied to drug testing. BN's argument that it has, or should have, an absolute right to change conditions of employment with respect to drug use is diametrically opposed to the position of the NLRB's General Counsel.

ion that effective drug and alcohol control programs must be cooperative labor-management programs and fashioned through collective bargaining. Manello, *Prevalence, Costs and Handling of Drinking Problems on Seven Railroads*, Federal Railroad Administration, Technical Report, Contract No. DOT-TSC-1375 (1979). See also testimony of Dr. Robert J. Pandina, Resp. App. at 4a.

Nor is this an appropriate vehicle to be used to provide guidance upon the factors and considerations that BN places before the Court. The issues raised in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 56 *U.S.L.W.* 3590 (U.S. Mar. 1, 1988) (No. 86-1879), and *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir. 1988), *pet. for cert. filed*, No. 87-1555 (Mar. 17, 1988), are of far greater importance than the Railway Labor Act issue raised by the instant petition and any rulings therein would provide significant direction in regard to those factors. This case too is such that a well-considered opinion cannot be given upon the considerations advanced by BN, assuming the record would permit them to be reached. Those matters should be left to a case in which they can be appropriately determined judicially, if at all.

If anything, this matter has been in progress since 1985. During that period, BN could have bargained with BLE regarding a comprehensive, cooperative program. Instead, BN has steadfastly refused to bargain. During that same period, BLE has negotiated a "model program" with CSX, for example. If BN had bargained in good faith with BLE on a complete drug and alcohol program, which includes testing as in the CSX program, its concerns and the concerns of BLE and its members might have been accommodated long before now.

Until the Congress sees fit to remove particular subjects from the collective bargaining sphere, the public interest will best be served by requiring adherence to the mandatory requirements of the Railway Labor Act. Collective bargaining will also insure that each employee's rights will be adequately protected. With those procedures being collectively bargained with adequate safeguards that would necessarily be developed in any collaborative program, it would be likely that litigation and controversies will be limited, thereby reducing strains upon the forums dealing with such problems and tensions in the labor-management relationship.

In any event, BLE submits that this case does not involve a situation demanding the exercise of this Court's guidance, as contended by petitioner. The determination of the court of appeals, whether or not correct—and respondent believes it was—is not one warranting this Court's attention.

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## CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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# APPENDIX

Excerpts of Testimony of Robert J. Pandina from Transcript in *Transport Workers Union, Local 234, et al. v. Southeastern Pennsylvania Transportation Authority* Civil Action No. 87-0389, etc., United States District Court for the Eastern District of Pennsylvania (678 F. Supp. 543 (E.D. Pa. 1988)).

(February 5, 1987)

(p. 267) ROBERT J. PANDINA, having been duly sworn, was examined and testified as follows:

(Direct Examination)

(p. 283) Q. What other elements would you think are essential to provide an effective or successful program?

A. I preface my remarks by saying this is an area in which a tremendous amount of clinical and what we would call experimental, or quasi-experimental work is being done at the present time. It is far from an exact science, if you will.

However, we have learned some lessons from our experience to date. For example, it is my opinion, based on my experience and from the examples in which I have been involved, that any effective program must have a number of elements with the treatment rehabilitation component being only one of those legs of the stool upon which such a program can rest.

Another element is clearly an education and training program. And here, by that I mean a broad-based program. Not simply for supervisors or for management, but would also include employees to help to motivate em-

ployees to understand the problems involved in any drug usage and the ways in which such drug usage could compromise their competency not only on the job but in their own personal functioning.

In a sense, here we are talking about a kind of motivational component and an information component. We are trying to inform people what the problems related to drug use are. And to motivate them to be abstinent; that is, drug free.

A second component part of that training program is (p. 284) also to help train them with regard to the rules, whatever those rules are, with regard to company management policies so that they understand how to use such systems as rehabilitation systems. After all, a rehabilitation system cannot be very effective if you cannot obtain bodies to put in the system, and it is important to find a way to motivate employees to the system and teach them how to use it.

You must also train others in a position of authority, such as management personnel, supervisors, you must train them in the same way that you train all employees with regard to problems related to alcohol and drug use and abuse, and as well as to train them to the way the system operates in that particular culture.

You then, in addition to education and training programs, must also have a rehabilitation component; that is, a treatment component, including a screening component which would allow you to deal with employees who have such problems.

A third and important element is a set of rules and penalties, sanctions, with regard to use of various kinds

of substances in the environment, and there needs to be, in essence, sanctions against the use of such drugs, or use of such drugs in a manner in which they will interfere with or can potentially interefer (sic) with the performance of the individual. This is, in a sense, an external incentive.

I make a distinction between a motivation where we (p. 285) are attempting to provide information to the individual to motivate them toward a particular behavior, and an incentive in the environment.

One of the other incentives in the environment, I consider this to be critical, is the ability of the system to deal with individuals who voluntarily come forward to be treated and not to impose severe sanctions against people who voluntarily come forward.

I would also be concerned that those individuals receive whatever compensation during that period of disability that they might receive, as they might receive for any other disability. In other words, it has to be within the culture, the climate of the organization.

I would expect the organization, for example, if it paid for sick benefits for pneumonia, or a mental dysfunction, also to pay for any drug abuse treatment, up to some reasonable limits, and that is negotiated between the management and the union.

Those are the basic elements in any what I would consider to be a good program. Without any of those, you've got some real problems.

* * *

(February 6, 1987)

(Cross-Examination)

(p. 492) Q. I gather from your testimony in chief that you do believe that one of the major ingredients in having a good drug and alcohol program with any employer is a cooperative program between labor and management.

A. Absolutely.

Q. And would you say that there should be negotiated programs between those parties?

MR. MEYER: I object, your Honor. That really goes to one of the matters that you have to decide in this case.

THE COURT: Overruled.

You may answer.

A. Could you restate the question, or could we have it read back?

(p. 493) (The court reporter read back the pending question.)

A. Under the best of circumstances, that would be most desirable.

Q. And, would you say in your judgment that the negotiations should include a cooperative labor management rehabilitation phase in that program?

A. I don't think I understand your terminology, sir.

Q. Or should the two parties, labor and management, sit down and also draw up the requisites, and et cetera, of a rehabilitation program?

A. In theory I would say that that is an important element. Of course you also have to take into account, as you probably well know, the history of the way labor and management have operated in the past in such types of agreements.

* * *

(September 21, 1987)

(Recross-Examination)

(p. 97) Q. I believe you testified last time that represent—involvement by a labor union, representing employees, is important in an EAP, if the EAP is going to work; is that correct?

(p. 98) A. I said that's an important element, yes, it's a desirable element, yes.

Q. What role would that the union have in that circumstance?

A. I would see the chief role of that union would be to encourage its membership to participate in the employee assistance program. I would also see it joining it as a partner in that EAP program, particularly in the area, as I've mentioned, to encourage individuals to participate. I would hope that they would have the opportunity to make comment on the program that was suggested by management.

* * *

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|---|
| BROTHERHOOD OF LOCOMOTIVE ENGINEERS, | ) | No. 85-4138 |
| Plaintiff-Appellee, | ) | D.C. No. CV 84-213-GF |
| vs. | ) | |
| BURLINGTON NORTHERN RAILROAD COMPANY, | ) | OPINION |
| Defendant-Appellant. | ) | (Filed Feb. 11, 1988) |

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and submitted July 8, 1986
Seattle, Washington

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

ALARCON, Circuit Judge:

Defendant/appellant Burlington Northern Railroad Company (hereinafter BN) appeals from the district court's grant of a permanent injunction in favor of plaintiff/appellee Brotherhood of Locomotive Engineers (hereinafter BLE). BLE had sought declaratory and injunctive relief to enjoin BN from using dogs (hereinafter sniffer dogs) trained to detect the presence of controlled substances on the person or in the personal effects of railroad

employees in violation of the notice, negotiation, and mediation requirements imposed by the Railway Labor Act (hereinafter RLA), 45 U.S.C. §§ 152, Seventh and 156 (1982). The question we must resolve is whether BN's random use of sniffer dogs to detect the presence of controlled substances on the person or in the personal effects of railroad employees presents a "minor" or "major" dispute under the Act, 45 U.S.C. §§ 151-188. This case was consolidated for argument with *Brotherhood of Locomotive Eng'rs v. Burlington N. RR.*, No. 85-4137 (9th Cir. 1986) (hereinafter the *Chemical Testing Case*), wherein we reviewed BN's practice of mandatory urine and blood testing practice following an accident or operating rule violation. We affirm because the facts demonstrate that BN's random use of sniffer dogs is not arguably permitted under the parties' implied agreement. Therefore, the dispute between the parties is major and must be resolved through mediation and negotiation.

## I. FACTS AND PROCEDURAL HISTORY

Following two serious train crashes in April 1984, BN intensified its efforts to enforce Rule G which prohibits the possession or use of alcohol, controlled substances or medications that may adversely affect safety.[1] BN con-

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[1] Rule G provides:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by employees subject to duty, or their possession or use while on duty or on company property, is prohibited. Employees must not report for duty under the influence of any marijuana or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

tracted for the services of trained handlers and sniffer dogs to detect the presence of controlled substances on its premises.[2] The sniffer dogs were sent to workplaces throughout BN's extensive railway system. Locations were usually selected because of a high incidence of accidents or safety violations. Occasionally, however, the dog handlers responded to tips of controlled substance usage. The district court found that some locations were chosen randomly.

The dogs were used to inspect vehicles in railroad parking lots, and were taken through yard offices and company buildings. During the random searches, the dogs also sniffed the personal effects of engineers coming on duty.[3] A BN supervisor would randomly request an engineer to place his grip on the ground and to step back while the dog sniffed around the closed container. The dogs were not ordered to sniff the person of the engineer. If the dog "alerted" on the grip, the supervisor would take the engineer to an office and request that the engineer sign a form consenting to a search. BN security staff would then search the grip, the engineer's person, and his vehicle. If the engineer refused to consent, he was sus-

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[2] There was evidence that after 1977, BN had occasionally used sniffer dogs to detect controlled substances. A dog handler testified that he had conducted searches using sniffer dogs for controlled substances on BN property on ten occasions prior to 1982. These searches included a search of a crewmember's personal effects. BN records indicate that between May 1984 and October 1984, BN spent over $90,000 on sniffer dogs, including $36,000 for September alone.

[3] Engineers and train crews frequently have to spend time away from home as part of their duty. These employees carry their personal belongings in grips.

pended from service pending investigation for a possible Rule G violation.[4]

BLE opposed the random use of sniffer dogs and urged BN to end the practice. BN refused to discuss the issue.

On October 5, 1984, BLE obtained a preliminary injunction preventing BN from using sniffer dogs. On July 31, 1985, after an evidentiary hearing, the district court granted the Brotherhood a permanent injunction under section 6 of the Act, 45 U.S.C. § 156.

The district court rejected as "specious" BN's claim that deciding the method of detection of safety rule violations falls within BN's managerial prerogative and thus is not a matter for collective bargaining. *Brotherhood of Locomotive Eng'rs v. Burlington N. R.R.*, 620 F. Supp. 163, 169 (D. Mont. 1985). The district court noted that the collective bargaining agreements between the parties made no reference to Rule G, nor to any specific method of detecting alcohol or controlled substance abuse, nor to blood and urine tests. The court found, however, that the proce-

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[4] Documentary evidence submitted to the district court showed that the dog teams operated in 50 locations in 17 states between May 1984 and October 1984 when the district court preliminarily enjoined the program. The dogs checked the personal effects of approximately 1000 train crews, including 250 engineers. The dogs alerted on the grips of 15 engineers; the subsequent searches did not disclose the presence of controlled substances. The dogs alerted on the grips of 61 non-engineer crewmembers; four positive searches ensued: one produced a bottle of alcohol, three uncovered controlled substances. Uncontroverted BN evidence showed a 26% increase in Rule G violation detections in the five months of the program over the first four months of 1984. In the same period, accidents and safety-related rule violations decreased by 52%.

dure for the detection and investigation of alcohol or controlled substance abuse adopted by the railroad, and acquiesced in by the union, had existed over a substantial period of time and had become an implied provision or condition of the collective bargaining agreement. *Id.* at 170. The district court also found that the procedure employed by the railroad to implement Rule G consisted of sensory observation by a supervisor of objective symptoms of alcohol or substance abuse, such as slurred speech, staggered walk, alcoholic breath, followed by a voluntary blood or urine test, if the employee wished to clear himself of suspicion. The court held that because the evidence presented at the hearing demonstrated that the practice of randomly searching the personal effects of employees was never agreed to, or acquiesced in, by BLE, the dispute was major and not "arguably justified" under the terms of the implied agreement extant between the parties. *Id.* at 171-72. The district court enjoined BN from attempting to change the implied agreement between the parties with respect to the detection of violations of Rule G.

## II. STANDARD OF REVIEW

We review the grant of a permanent injunction for an abuse of discretion. *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986), *cert. denied*, — U.S. —, 104 S. Ct. 2462. Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions. *Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir. 1982); *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1133-34 (9th Cir. 1979).

## III. ANALYSIS

BN has presented three discrete and inconsistent theories in support of its contention that the district court abused its discretion in granting a permanent injunction. First, BN claims the use of sniffer dogs is not a proper subject for collective bargaining. Secondly, the railroad contends that use of sniffer dogs has become an implied term of the collective bargaining agreements through past practice. Finally, it is asserted that the use of sniffer dogs was omitted from the collective bargaining agreements and does not create new rights. The record does not support any of these arguments. We analyze each theory under separate headings.

### A. *Managerial Prerogative*

BN contends that since no provision of the collective bargaining agreement between the parties restricts the methods or procedures for detecting violations of Rule G, any procedure it chooses to employ is a matter within BN's managerial prerogative. Therefore, BN reasons, its unilateral implementation of a particular method of detection, such as the use of sniffer dogs, is not a labor dispute under the Act.

This claim lacks merit. As discussed below, because of the existence of an implied agreement regarding the procedures BN may employ in detecting alcohol and substance abuse, BN's choice of methods to detect violations of Rule G is not a matter of managerial prerogative.[5]

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[5] We express no opinion as to whether measures such as those imposed by BN in this case could be justified as an exercise of managerial prerogative in the absence of an implied agreement.

*Accord, Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R.*, 802 F.2d 1016, 1021, n.21 (8th Cir. 1986) (summarily rejecting BN's management prerogative in a related case).

B. *The Dog Sniffing Practice Is Not Arguably Justified*

BN contends that even if its decision to use sniffer dogs is not a matter of managerial prerogative, the challenged method of detection is only a minor dispute under the Act because the practice is arguably justified by the parties' implied agreement. We disagree. The parties' implied agreement required a triggering event—the perception of facts that a specific worker had exhibited symptoms of the use of alcohol or a controlled substance—before further investigation could be undertaken. The use of the sniffer dogs was not triggered by an observation that a specific individual was exhibiting objective symptoms of the use of alcohol or a controlled substance. It is quite true that the choice of the *location* of a search was not always random. The district court found, however, that the selection of the *individual* to be searched was random.

Beyond this, under the implied agreement, an investigation was permitted to determine *prior* consumption of alcohol or controlled substances. The district court found that "[t]he practice which evolved over time was one premised upon a determination, through sensory observation, that cause existed to believe a particular employee was *under the influence* of a substance prohibited by Rule G." *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 170 (emphasis added). Additionally, the court determined

that "[i]f, on the basis of his observations, a supervisor concluded that an on-duty employee was *under the influence* of a prohibited substance, the supervisor would conduct a further investigation and, if necessary, ultimately initiate the appropriate disciplinary procedures." *Id.* (emphasis added). Thus, the implied terms of the collective bargaining agreements did not include a search for the *possession* of alcohol or controlled substances to prevent *future* use. Therefore, the random use of sniffer dogs by BN to detect possession of controlled substances, in the absence of objective facts demonstrating prior use, is not arguably permitted under the implied agreement.

C. *"Omitted Case"*

BN contends that since there is no specific provision in the collective bargaining agreements limiting the methods of detecting violations of Rule G, the use of dogs to detect the possession of a controlled substance is an "omitted case" under *Ry. Labor Executives Ass'n v. Atchison, T. & S. F. Ry. Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). BN's reliance on *Atchison* is misplaced.

The term "omitted case" first appears in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945). In defining a minor dispute, the Supreme Court instructed as follows:

> [A minor] dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. *In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries.*

*Id.* at 723 (emphasis added; *cf. Airline Flight Attendants in Service of Int'l Texas Airlines, Inc. v. Texas Int'l Airlines*, 411 F. Supp. 954, 959 (S.D. Tex. 1976) (the court held that the "dispute is arguably covered by the parties' collective bargaining agreement[,]" *id.* at 960, and in dictum discussed the omitted case theory, *id.* at 961), *aff'd mem.*, 566 F.2d 104 (5th Cir. 1978). The Supreme Court has not subsequently applied the term "omitted case."

BN argues that "since the written agreements are admittedly silent, [the dispute] should be considered an omitted case, and thus a minor dispute referrable to the Adjustment Board." Adoption of this bold and novel proposition would eliminate the major dispute resolution procedures of the Act. Under the Act, as interpreted by this court, major disputes involve "efforts to secure new rights" not now part of a collective bargaining agreement. *Int'l Ass'n of Machinists & Aerospace Workers v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). BN's assertion of the right to use sniffer dogs to search the personal effects of its employees for possession of a controlled substance is not a part of the express or implied terms of the existing collective bargaining agreements. Therefore, the issue presents a major dispute.

In *Atchison*, railway employees brought an action for damages for loss of work resulting from discontinuance of the operation of four interstate trains by the railroad. 430 F.2d at 995. The employees attempted to evade the Railway Labor Act by styling their claim as a tort action for the violation of a statutory duty, and not therefore, a matter within the exclusive jurisdiction of the Adjustment Board. *Id.* at 997. The district court dismissed the action

because the challenged conduct raised a minor dispute "properly cognizable by the National Railroad Adjustment Board under provisions of the Railway Labor Act, 45 U.S.C. §§ 151-162." *Id.* at 996. We agreed with the district court and affirmed. *Id.* at 997. We noted that "[i]t is also *undisputed* that this is a 'minor dispute" in the sense that 'the claim is to rights accrued, not merely to have new ones created for the future.'" *Id.* at 996 (quoting *Elgin*, 325 U.S. at 723) (emphasis added). Because it was "undisputed" that the dispute was minor, it was not necessary for us to explicate the factual theory supporting this finding. Nevertheless, our opinion contains the following explanatory dictum:

> Here the collective agreements make no specific provision for the payment of wages following discontinuance of a train. However, nothing in the agreements exclude such protection for the affected employees. Whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the 'usage, custom, and practice' of the industry, or whether it was rejected following negotiation does not appear in the record and is a matter requiring the expertise of the Adjustment Board.

*Atchison*, 430 F.2d at 996 (citations omitted). Unlike the procedural posture of the case presented to us in *Atchison*, where we dismissed the action on jurisdictional grounds, this matter is before us after a trial on the merits. Thus, we have a record regarding the "usage, custom, and practice of the industry." We need not speculate as to BN's theory or the factual bases for the district court's holding. BN did not contend before the district court that the use of sniffer dogs to detect possession of a controlled sub-

stance was omitted from the collective bargaining agreements because the parties relied on the language of a statute to support the use of sniffer dogs. It cannot do so now for the first time on this appeal. We need not guess whether the parties relied on custom, usage, and practice concerning the procedures followed by BN. The trial court heard evidence on this factual issue and found that there was an implied agreement between the parties based on custom and practice. *Brotherhood of Locomotive Eng'rs*, 620 F. Supp. at 170. The district court expressly found that the procedures used by BN and acquiesced in by the Brotherhood did *not* include the use of sniffer dogs for the random detection of the possession of a controlled substance. *Id.* at 171-72. The facts support this finding. We review findings of fact following the granting of a permanent injunction under the clearly erroneous standard.

The district court's determination that the implied agreement did not arguably justify the use of sniffer dogs was not clearly erroneous. Furthermore, the fact that there was an implied agreement covering the procedure to be used in detecting Rule G violations demonstrates that this subject matter was not "omitted" from the collective bargaining agreement.

BN also argues that the use of sniffer dogs was not random. This, too, presents a question of fact which was resolved against BN by the district court. The facts, while conflicting, support the court's finding that the searches of the personal effects of individual employees were random. The record contains evidence that the dogs were used to sniff the personal effects of railroad workers notwithstanding the fact that there was no evidence that the specific individual had used or was then in the possession

of a prohibited substance. Evidence presented by BN showed that on some occasions the dogs were sent to locations where there had been a high incidence of accidents or safety and operating rule violations. No proof was offered, however, that BN supervisors were aware, *prior to the search*, that each person, whose personal effects were subjected to dog sniffing at such places, had a controlled substance in his possession, or was observed to be under the influence of a controlled substance. The district court's finding that the searches were random is not clearly erroneous.

The district court did not abuse its discretion in granting an injunction. The use of sniffer dogs presented a major dispute.

The judgment is AFFIRMED.

COUNSEL

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*Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company*, No. 85-4138

(Filed February 11, 1988)

PREGERSON, Circuit Judge, concurring.

In this appeal, we are called on to decide whether the Railway Labor Act ("RLA") bars Burlington Northern from unilaterally implementing a sniffer dog program de-

signed to restrict alcohol and narcotics use by on-duty railroad workers. The program requires engineers, before embarking on trains from certain yards, to submit their grips to a trained dog to sniff for the presence of controlled substances. Although I concur in the result arrived at by Judge Alarcon's opinion, I get there by a somewhat different route. First of all, I deal more extensively with the management perogative issued (sic) raised by Burlington Northern. Second, I explicitly reject the district court's "modicum of evidence" approach for determining whether the sniffer dog program is arguably justified by the collective agreement's implied sensory surveillance provision. Instead, I base my analysis on the arguable intention of the parties as manifested by custom and practice. I conclude that the program is not justified. Finally, because Burlington Northern raised the "omitted case" doctrine before the district court, I have sought to clarify the doctrine and show that it is inapplicable to the dog sniff procedure.

## FACTS

For at least 40 years, Burlington Northern ("BN") in common with many other railroads, has had a unilaterally implemented safety rule ("Rule G") prohibiting its employees from using both alcohol and narcotics while on duty and from possessing such substances while on company property. Rule G also bars employees from reporting for duty in a state of intoxication that may in any way impede their ability to perform their work safely.[1]

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[1] Rule G presently states:

> The use of alcoholic beverages, intoxicants, narcotics, marijuana, or other controlled substances by

(Continued on following page)

The collective bargaining agreements between BN and its employees' unions do not expressly or implicitly refer to Rule G.

Undisputed evidence presented to the district court indicated that, before May 1984, BN relied primarily upon sensory surveillance to enforce Rule G. If an employee's gait, breath, odor, slurred speech, bloodshot eyes, or errant behavior suggested to a supervisor or security officer that the employee was intoxicated, BN suspended the employee pending a formal investigation under established procedures.

On April 15, 1984 a train crash in Wiggins, Colorado killed five BN employees and caused $2 million in property damage. The National Transportation Safety Board ("NTSB") implicated alcohol abuse by an engineer as a possible cause of the accident. On April 21, a train disobeyed an "absolute stop" signal and crashed into a standing train at Newcastle, Wyoming. Two BN employees died and property damage totaled $1 million. A toxicology report indicated that three crew members had marijuana traces in their body fluids.

Following these two serious crashes, BN intensified its efforts to enforce Rule G by introducing two new pro-

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> employees subject to duty, or their possession or use while on duty or on company property is prohibited. Employees must not report for duty under the influence of any marijuana, or other controlled substances, or medication, including those prescribed by a doctor, that may in any way adversely affect their alertness, coordination, reaction, response or safety.

BN unilaterally added the reference to "marijuana, or other controlled substances" in 1980.

grams. First, all crew members involved in an accident or operating rule violation were required immediately to attend a clinic and submit to a urinalysis test for the presence of narcotics. Only crew members involved in accidents or operating rule violations demonstrably due to equipment failure were exempted. Moreover, BN's rules required any employee suspected through sensory surveillance of intoxication to submit to mandatory urinalysis. An employee who refused to submit to mandatory urinalysis was subject to discipline for insubordination.[2]

Second, BN contracted for trained sniffer dogs to detect narcotics on its premises. The dog teams visited work places throughout BN's extensive network. Locations were usually selected by their high incidence of accidents or safety violations, and occasionally the dog teams responded to tips of drug usage. A few locations also were chosen randomly. The dogs checked vehicles in parking lots and were taken through yard offices and company buildings. The dogs also sniffed the "grips" of engineers coming on duty.[3]

In conducting the sniffer dog program, the following procedures were employed. A BN supervisor would

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[2] BN's mandatory urinalysis program closely mirrors Federal Railroad Administration ("FRA") regulations that took effect on November 1, 1985. *See* 49 C.F.R. § 219 (1985). The district court upheld the FRA regulations over a fourth amendment challenge, and the appeal. *Railway Labor Executives' Association v. Dole*, No. 85-2891, was argued before us on the same day as this case and another companion case involving BN's mandatory urinalysis program, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, No. 85-4137. These cases will be dealt with by separately filed opinions.

[3] Engineers and train crews are frequently required to spend time away from home. On those occasions, these employees carry their personal belongings in grips.

request the engineer to place the grip on the ground and to step back while the dog sniffed around the grip. If the dog "alerted" on the grip, the supervisor would take the engineer to an office and request that the engineer sign a form consenting to a search of the grip. BN security staff would then searched (sic) the grip, its contents, the engineer's person, and often also the engineer's car, for narcotics. The dogs did not sniff the engineer. If the engineer refused to consent to a search, the supervisor suspended the engineer from service pending an investigation for a possible Rule G violation.[4]

The Brotherhood of Locomotive Engineers ("BLE") strenuously opposed the use of the sniffer dogs and urged BN to end the program. BN refused to negotiate. BLE then balloted its branch chairmen on whether to strike on the sniffer dog issue. A majority of respondents voted in favor of a strike.

The district court granted BLE a preliminary injunction on October 5, 1984 prohibiting BN from using the

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[4] The searches were exceptionally thorough, including fanning the engineer's checkbook, taking the credit cards from his wallet, and checking under the carpet of his car. Two engineers testified that their consent to the searches was involuntary because they understood that a refusal to consent would result in a discharge. Neither of the testifying engineers was charged with a Rule G violation.

Documentary evidence shows that the dog teams operated in fifty locations in 17 states from May 1984 until October 1984 when the district court preliminarily enjoined the program. The dogs checked the grips of approximately 1000 train crew members, including 250 engineers. The dogs alerted on the grips of 15 engineers; *all* of the subsequent searches of those grips *revealed nothing*. The dogs alerted on the grips of 61 non-engineer crewmembers; four positive searches resulted: one produced a bottle of alcohol, and three uncovered narcotics.

sniffer dogs. After conducting several evidentiary hearings, the court announced its decision in an opinion filed in July 1985. *See Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 620 F. Supp. 163 (D. Mont. 1985). The district court found that "sensory surveillance by certain supervisory personnel" supported by "at least a modicum of evidence" of intoxication had been established by custom and practice as the only method of enforcing Rule G. The district court further found that this custom and practice constituted an implied term of the collective agreement. 620 F. Supp. at 170-171. The court stated that "[t]he critical term of [the collective] agreement . . . is the term requiring a modicum of evidence that a particular employee was operating under the influence of a prohibited substance, before a supervisor could conduct further investigation." *Id.* at 175.

The court concluded that random use of sniffer dogs was not "arguably justified" under the collective agreement as amended by custom and practice, and thus BN's use of sniffer dogs, challenged by the unions, constituted a "major dispute" under the RLA requiring the court to enjoin the sniffer dog program. *Id.* at 172. BN appealed this decision which is the subject of the instant appeal.

## STANDARD OF REVIEW

Whether a matter constitutes a mandatory subject of bargaining under the RLA is a question of law which we review *de novo*. *See Japan Air Lines Co. v. IAM*, 538 F.2d 46, 52-53 (2d Cir. 1976); *cf. NLRB v. International Harvestor Co.*, 618 F.2d 85, 87 (9th Cir. 1980). Whether past conduct constitutes custom and practice sufficient to be incorporated as an implied term in a collective agreement

covered by the RLA is a question of fact. *See Missouri Pacific Joint Protective Board, Brotherhood Railway Carmen of the United States and Canada v. Missouri Pacific Railroad Co.*, 730 F.2d 533, 537 (8th Cir. 1984); *cf. Hass v. Darigold Dairy Products Co.*, 751 F.2d 1096, 1101 (9th Cir. 1985) (implied terms in collective agreement under NLRA). We accept a district court's determination of questions of fact unless clearly erroneous. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Whether a dispute constitutes a major dispute or a minor dispute under the RLA is a matter of law which we review *de novo*. *IAM v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985).

## ANALYSIS

BN presents alternative arguments in support of its contention that the district court may not enjoin the dog sniff program. BN first contends that the enforcement of Rule G is a matter entirely within its managerial prerogative. Alternatively, BN contends that the challenged procedure presents not a major but a minor dispute, over which the district court lacks jurisdiction, because: (1) the procedure is arguably justified by an implied-in-fact term of the collective agreement; or (2) the procedure is covered by the omitted case doctrine.

### A. *Management Prerogative*

Neither party disputes the fact that Rule G itself is an implied term of the collective agreement. BN asserts, however, that selecting the method used to enforce a safety rule like Rule G is entirely a matter of management prerogative and not subject to collective bargaining. BN

argues that, because Rule G enforcement is a matter of managerial prerogative, it is not an issue subject to collective bargaining under the RLA. Thus, any prior enforcement practice cannot be an implied condition of the collective agreement or give rise to a labor dispute within the terms of the RLA.

The district court rejected this position. 620 F. Supp. at 169. I agree with the district court that BN's management prerogative claim is unfounded.

The RLA requires BN "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, *and working conditions.*" 45 U.S.C. § 152 (emphasis added). No court, however, has comprehensively explained the scope of the statutory phrase "working conditions."

In *Japan Air Lines Co. v. IAM*, 538 F.2d 46, 51-53 (2d Cir. 1976), the Second Circuit rejected as inconsistent with the legislative history and purpose of the RLA, the union's assertion that the RLA required the parties to bargain over *any lawful proposal* advanced by either side. It held that the RLA mandated bargaining only over "rates of pay, rules, and working conditions." *Id.* at 52. *Accord IAM v. Northeast Airlines, Inc.*, 473 F.2d 549, 556-57 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972); *Brotherhood of Railroad Trainmen v. Akron and Barberton Belt Railroad Co.*, 385 F.2d 581, 599 (D.C. Cir.), *cert. denied*, 390 U.S. 923 (1968). Therefore, the court upheld the carrier's management prerogative to determine whether to cease subcontracting ground work at certain airports because the "primary impact" of the union's proposal did not affect the working conditions of the union's present

members. 538 F.2d at 52. In so holding, the Second Circuit contrasted *Japan Air Line's* situation with that which existed in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *Order of Railroad Telegraphers v. Chicago North Western Railway Co.*, 362 U.S. 330 (1964), in which "the critical question was whether those who were working were to lose their jobs." 538 F.2d at 52-53.

The *Japan Air Lines* approach is simple and pragmatic: if loss of existing employment or employment-related benefits, or potential loss, is the primary impact of the proposal at issue, the RLA requires the parties to bargain over the proposal consistent with the Act's procedures. I would adopt this approach as the rule of this circuit. Here, a Rule G violation, however discovered, could result in an employee's discharge. The critical issue in this case is whether the jobs of present employees are jeopardized by the two enforcement programs. Because jobs of present employees are jeopardized, BN's sniffer dog program is a mandatory subject of bargaining under the RLA and may not be implemented unilaterally.

The district court was, therefore, correct to reject BN's assertion of management prerogative and to reach the question of the nature of the dispute under the RLA.

B. *Major v. Minor Dispute*

Under the Railroad (sic) Labor Act, disputes between railroads and their employees fall into two "sharply distinguished" categories—"major disputes" and "minor disputes." *See Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 722, (1945), *aff'd on rehearing*, 327 U.S. 661 (1946); *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141,

1145-56 (9th Cir. 1975) (tracing historical development of RLA).[5]

Major disputes arise out of the formation of collective bargaining agreements or unilateral efforts to secure new rights and incorporate them into future agreements. *Elgin*, 325 U.S. at 723; *Aloha*, 776 F.2d at 815. Minor disputes involve the interpretation or application of existing collective bargaining agreements. *Elgin*, 325 U.S. at 723; *Aloha*, 776 F.2d at 815. The distinction between minor and major disputes has important procedural consequences.

Generally, *major* disputes are "left for settlement entirely to the processes of noncompulsory adjustment." *Elgin*, 325 U.S. at 723-24. A detailed procedure is provided in 45 U.S.C. §§ 152, 155, 156, 157, and 160 for moving the dispute through initial conference and negotiation, submission to the National Mediation Board, voluntary arbitration and, possibly, investigation by a special emergency board appointed by the President. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). "No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." *Elgin*, 325 U.S. at 725. Pending the exhaustion of the Act's mechanisms for resolving a major dispute, the status quo applies. The duty to maintain the status quo may be enforced by obtaining injunctive relief in a federal district court. *See Aloha*, 776 F.2d at 816.

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[5] The terms "major dispute" and "minor dispute" are not found anywhere in the RLA. The Supreme Court in *Elgin* coined the terms as a methodology to be used by courts confronted by disputes arising under the RLA. *See Aloha*, 776 F.2d at 815 n.2.

In contrast, *minor* disputes are subject to compulsory and binding arbitration. *See* 45 U.S.C. § 153(first)(i). This task is performed by the National Railroad Adjustment Board or a privately established arbitration panel. *See generally* Seidenberg, *Grievance Adjustment in the Railroad Industry* in *The Railroad Labor Act at Fifty* 229-35 (National Mediation Board ed., 1976). The arbitrators have exclusive jurisdiction over minor disputes. *See Slocum v. Delaware, Lackawanna & Western Railroad Co.*, 339 U.S. 239, 244-45 (1950). Thus, federal courts have no subject matter jurisdiction over minor disputes. *Aloha*, 776 F.2d at 815. When only a minor dispute is involved, there is no duty to maintain the status quo and judicial review of the arbitration panel's decision is extremely limited. *See Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 91 (1978) (per curiam).

The test in our circuit for determining if a dispute involves only the interpretation or application of an existing agreement, and is therefore minor, or involves the formation of a collective agreement or a unilateral effort to change working conditions, and is therefore major, derives from *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). *See Aloha*, 776 F.2d at 815-16; *O'Donnell*, 551 F.2d at 1146-47; *Southern Pacific Transportation Co. v. United Transportation Union*, 491 F.2d 830, 832 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974). We have reformulated the test several times. *See Switchmen's*, 398 F.2d at 447 (only if the disputed action is "in nowise contemplated or arguably covered by the agreement" does it give rise to a major dispute); *Southern Pacific Transportation Co.*, 491 F.2d at 832-33 (A dispute is minor when a contract provision is "rea-

sonabl[y] susceptible" to a party's interpretation); *O'Donnell*, 551 F.2d at 1146 ("Is the position of at least one of the parties *arguably* predicated on the terms of an agreement?"); *Aloha*, 776 F.2d at 816 (major dispute concerns issue "neither contemplated nor arguably covered" by collective agreement).

The district court accurately summarized the essence of these various reformulations as *whether the railroad's actions are "arguably justified" by the collective agreement* between BN and the BLE. *See* 620 F. Supp. at 175. If the railroad's actions *are* arguably justified, the dispute is a *minor* dispute; if they are *not* arguably justified, the dispute is a *major* dispute. When in doubt, courts construe disputes as minor. *See O'Donnell*, 551 F.2d at 1146-47 (*Switchmen's* test "is not a stringent one"); *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985) (citing cases).

1. *Sensory Surveillance as Implied-In-Fact Condition to the Collective Agreement*

In *Detroit and Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 153 (1969) (*Shore Line*), the Supreme Court held that the scope of the status quo in a major labor dispute includes "those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute."

Although *Shore Line* concerned a dispute that all sides agreed was a major dispute, its teaching applies to *all* railroad labor disputes—major or minor. The Supreme

Court's holding that the status quo in a major dispute includes employment terms established by past practice means that a railroad collective agreement includes *both* express terms and terms implied by past practice. *See Maine Central Railroad Co. v. United Transportation Union*, 787 F.2d 780, 782-83 (1st Cir.) (railroad's assertion that proposed action comported with past custom and practice was arguably correct and thus dispute was minor), *cert. denied*, 107 S. Ct. 169 (1986).

Relying on *Shore Line*, the district court concluded that both Rule G and its customary enforcement by sensory surveillance were implied terms of the collective agreement between BN and BLE. 620 F. Supp. at 170. The district court found that sensory surveillance by BN's supervisors had been the only regular method of Rule G enforcement for over forty years and that BLE had long acquiesced in this practice. There is ample evidence in the record to support this conclusion. Several BLE officials with long experience regarding BN's operating procedures so testified. Moreover, BN never disputed that sensory surveillance by BN's supervisors was the primary means of detecting Rule G violations before 1984.

The district court also found that BN's occasional use of sniffer dogs before 1984 did not rise to the level of custom and practice. This conclusion is also supported by the record. *See* note 4 *supra*.

Because Rule G enforcement is a mandatory subject of bargaining, and because the district court did not clearly err in finding that sensory surveillance was the customary means of detecting Rule G violations, I would uphold the court's conclusion that Rule G enforcement by sensory

surveillance was an implied condition of the collective agreement.

The district court further determined that the custom and practice of relying on sensory surveillance by BN's supervisors to detect Rule G violations arguably justifies any reasonable enforcement method based on "a modicum of evidence." 620 F. Supp. at 171. In the instant case, the court concluded that such an implied condition did not arguably justify BN's dog sniff program because engineers subjected to dog sniffs were selected at random, i.e., their selection to determine whether they had violated Rule G was not based on a "modicum of evidence." *Id.* at 171-72.

In my view, the district court's "modicum of evidence" rationale begs the question. The critical inquiry should not be whether an enforcement procedure is triggered by sufficient objective facts, but whether the parties to this labor dispute, by their conduct, can be said to have agreed to the challenged enforcement procedure. It seems to me farfetched to conclude that the BLE, by acquiescing in Rule G's enforcement by sensory surveillance of an employee's gait, breath, odor, slurred speech, or blood shot eyes, can be said to have agreed to allow BN to implement *any* procedure beyond sensory surveillance so long as the procedure is triggered by a "modicum of evidence."

The kind of sensory surveillance that BN's supervisors had employed in the past did not implicate the serious privacy intrusions posed by BN's use of sniffer dogs. I believe that it is incorrect to conclude that the union impliedly agreed to the current use of sniffer dogs just because "through custom and practice" it had for forty

years accepted enforcement of Rule G by the non-intrusive procedure of sensory surveillance. Moreover, such sensory surveillance as employed by BN's supervisors entailed individualized suspicion whereas the use of sniffer dogs rests on group suspicion. The use of sniffer dogs is, in my view, a clear change in working conditions governed by the collective agreement and, thus, by definition, a major dispute.

It may well be that the use of sniffer dogs is an appropriate response to BN's safety obligations. However, the merits of the procedure are not before us. I would, therefore, conclude that BN's use of sniffer dogs is not *arguably* justified by the implied provision in the collective agreement that BN may enforce Rule G by sensory surveillance.

2. *The Omitted Case Doctrine*

The Supreme Court first referred to the "omitted case" doctrine in *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. at 723. An omitted case refers to a "claim founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*, e.g., claims on account of personal injuries." *Id.* (emphasis added). If an omitted case is involved, the dispute may be characterized as a minor dispute if it is arguably justified by an implied-in-law provision in the collective agreement.

In rejecting BN's omitted case argument, the district court noted that an omitted case arises only in a minor dispute, and concluded that, because BN's use of dog sniffs was a major dispute, it could not be an omitted case. 620 F. Supp. at 172. This application of the omitted case doctrine is inappropriate because it assumes the result.

As is true of all agreements, a collective bargaining agreement may include terms which, although omitted from the text of the agreement, are nonetheless part of the agreement because they are implied-in-law. Thus, it is necessary to determine whether the sniffer dog program, which is not covered by an express or implied-in-fact provision, is nonetheless arguably justified by an implied-in-law condition.[6]

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[6] We first considered the omitted case doctrine in *Railway Labor Executives' Association v. Atchison, Topeka and Santa Fe Railway Co.*, 430 F.2d 994 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971). There Santa Fe obtained the ICC's approval to discontinue rail service on a certain line. The railroad, however, discontinued the service early, and the union sued for the prematurely displaced workers' lost wages. We held that the dispute was minor because it involved an interpretation of an omitted provision of the collective agreement.

We concluded that the collective agreement contained

> no specific provision for the payment of wages following discontinuance of a train. However, nothing in the agreements exclude such protection for the affected employees. Whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the "usage, custom, and practice" of the industry, or whether it was rejected following negotiation does not appear in the record and is a matter requiring the expertise of the Adjustment Board.

*Id.* at 996 (emphasis added).

Despite the broad language in *Atchison*, the omitted case doctrine should only apply to implied-in-law conditions (statutory obligations) and not to implied-in-fact conditions (custom and practice) or conditions deliberately omitted from the collective agreement during earlier negotiations. In *Elgin*, the Supreme Court described an omitted case as a "claim founded upon some incident of the employment relation, or asserted one, *independent of those covered by the collective agreement*,

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The obligations of the Railroad Safety Act of 1970, as amended, 45 U.S.C. § 431 et seq., and the 230 detailed pages of federal regulations pursuant to the Act, 49 C.F.R. §§ 209.1-236.838 (1985), are implied-in-law conditions of the collective agreement between BN and the BLE. Similarly, the provisions of several earlier acts dealing with railroad safety and their enforcing regulations are all implied-in-law omitted conditions of the collective agreement. *See, e.g.*, 45 U.S.C. §§ 1-43 (safety appliances and equipment on railroad cars and rail lines); and 45 U.S.C. §§ 61-66 (limitations on hours of service railroad employees).

Federal Railway Administration regulations specifically prohibit any BN employee from using or possessing any controlled substance on railroad property, 49 C.F.R. § 219.101(a)(1). But, there are no statutes or regulations that authorize or require the railroad to use sniffer dogs to detect employees who use or possess drugs while at

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e.g., claims on account of personal injuries." 325 U.S. at 728 (emphasis added). The Court's example in *Elgin* must refer to a railroad's statutory obligation to pay workers' compensation to injured employees under the Federal Employers' Liability Act. Therefore, the scope of the omitted case doctrine is narrower than a superficial reading of *Atchison* might suggest.

In addition, BN contends that *Atchison* holds that the omitted case doctrine applies *whenever* the dispute is over a matter not prohibited or sanctioned by a collective agreement. A narrower reading of *Atchison* is more consistent with the RLA. A holding that any dispute over a matter neither prohibited nor sanctioned by a collective agreement is a minor dispute would reduce the number of major disputes to a small handful and would largely vitiate the major dispute resolution procedures of the Act.

work. In short, there is total legislative and administrative silence on this subject. Thus, there is simply no implied-in-law condition that could arguably justify BN's sniffer dog program, and the challenged program, which is outside the ambit of the collective agreement, is a major dispute.

## CONCLUSION

The permissible breadth of the measures that an employer may take to ensure that abuse of controlled substances does not impair an employee's work performance is a relatively novel and controversial issue. In this case, resolution of the issue is made more difficult by the intricacies of the Railway Labor Act, the silence of the express terms of the collective agreement on such matters, and a recognition of the havoc that an intoxicated railroad employee can wreak.

BN's use of sniffer dogs to enforce Rule G concerns "working conditions" and its primary impact may affect the job security of BN's employees. Therefore, the district court correctly concluded that the program is a mandatory subject of bargaining.

The district court also correctly concluded that the collective agreement included an implied-in-fact provision based on custom and practice that permitted BN to enforce Rule G through sensory surveillance. Moreover, I agree with the district court, but for different reasons, that this implied provision does not arguably justify a sniffer dog enforcement program. Finally, the Railroad Safety Act and the regulations promulgated thereunder offer no support for the proposition that the sniffer dog program is arguably justified as an implied-in-law condition under the

omitted case doctrine. Accordingly, the district court correctly held that the union's objections to the sniffer dog program presented a major dispute under the RLA. Thus, I vote to affirm the district court's issuance of an injunction enjoining the program.